IN THE SUPREME COURT OF OHIO

CASE NO. 2018-0572

CITY OF CLEVELAND, OHIO,
Plaintiff-Appellee,

-vs-

OHIO BUREAU OF WORKERS' COMPENSATION
Defendant-Appellants.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT, CUYAHOGA COUNTY, CASE NO. CV-17-105604

BRIEF OF *AMICUS CURIAE*, THE OHIO MUNICIPAL LEAGUE IN SUPPORT OF PLAINTIFF-APPELLEE, CITY OF CLEVELAND

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INTRODUCTION OF *AMICUS CURIAE*

This *Amicus Curiae* Brief is being submitted in accordance with S.Ct.Prac.R. 16.06(A). The Ohio Municipal League ("OML") is not a party to any active litigation involving the same claims, but nevertheless urges this Court to affirm the final judgment of the Eighth Judicial District Court of Appeals in all respects.

The OML was incorporated as an Ohio non-profit corporation in 1952 by city and village officials who saw the need for a statewide association to serve the interests of Ohio municipal government. Currently, the OML represents 730 of Ohio's 931 cities and villages. The OML has six affiliated organizations: the Ohio Municipal Attorneys Association, the Municipal Finance Officers Association, the Ohio Mayors Association, the Ohio Association of Public Safety Directors, the Ohio City/County Management Association, and the Ohio Municipal Clerks Association. On a national basis, the OML is affiliated with the National League of Cities, the International Municipal Lawyers Association, the U.S. Conference of Mayors, and the International City/County Managers Association. The OML represents the collective interest of Ohio cities and villages before the Ohio General Assembly and the state elected and administrative offices.

In 1984, the OML established a Legal Advocacy Program funded by the voluntary contributions of the members. This program allows the League to serve as the voice of cities and villages before the Ohio Supreme Court and the United States Supreme Court and Courts of Appeals by filing briefs amicus curiae on cases of special concern to municipal governments. The Ohio Municipal League has been accredited by the Ohio Supreme Court as a sponsor of both Continuing Legal Education Programs for attorneys and the required Mayors Court training for Mayors hearing all types of cases.

OML possesses a vested interest in ensuring that local governments receive fair and just treatment from the State of Ohio, most notably through the lawful and actuarially

sound calculation of their workers' compensation premiums. Workers' compensation is not optional for governmental employers, which are obligated to pay the premiums assessed by the state agency by R.C. 4123.38. Because they lack the political clout of many large private employers, particular care must be taken to prevent unfair and inequitable premium discrimination. As will be developed in the remainder of this Brief, it has become evident that such disparate mistreatment is now being suffered as a result of the state's decision to issue refunds—only to privately owned employers—correcting the serious imbalances that were created by the group-rating program.

STATEMENT OF THE CASE AND FACTS

Amicus OML adopts by reference the statement of the case and facts that have been submitted by Plaintiff-Appellee, City of Cleveland.

ARGUMENT

I. THE BUREAU'S ACKNOWLEDGEMENT OF PREMIUM OVERCHARGES

Defendant Bureau has attempted to create the illusion that the Eighth Judicial District has been meddling with legitimate administrative premium calculations, although nothing could be further from the truth. *Merit Brief of Defendant-Appellants Ohio Bureau of Workers' Compensation ("Defendants' Merit Brief") filed December 11, 2018, pp. 1-3, 32-41.* As observed in the comprehensive appellate opinion, the state agency's own representatives had been the first to recognize that the group-rating program introduced improper factors into the equations that were wholly unrelated to the risks actually presented by the participating public employers ("PECs"). *Cleveland v. Ohio Bur. of Workers' Comp.*, 2018-Ohio-846, 109 N.E.3d 84, ¶ 17-23, 99-104 (8th Dist.). The Chief Actuarial Officer, Christopher Carlson, and the Director of Actuarial Operations, Elizabeth Bravender, both testified that the manipulation of the off-balance factor resulted in "extra premiums" for the non-group PECs. *Id.* at ¶ 15-16. Former Chief

Actuarial Officer John Pedrick further confirmed that during the relevant period "nongroup-rated PECs were subsidizing over-sized discounts given to group-rated public employers through an increased off-balance factor." *Id.* at ¶ 21. These acknowledgments by the Bureau's own officials were fully supported by the independent studies that had been conducted at the state agency's request by Pinnacle Actuarial Resources, Inc., in 2006 and Deloitte Consulting, L.L.P., in 2009. *Id.* at ¶ 20. Because the premium calculations for the nongroup PECs were inflated by factors unrelated to their " 'individual accident experience' as required under R.C. 4123.39," an unjust enrichment had been established that could be remedied through traditional principles of equity. *Id.* at ¶ 101-113.

Rather than accept the opinions of its own Actuarial Officers and the conclusions of the independent studies that were commissioned, the defense team hired consultant Gary Josephson ("Josephson") to contradict the these specialists and force Cleveland's claims to trial. *Cleveland*, 2018-Ohio-846, 109 N.E.3d 84, at ¶ 42-45. The consultant still acknowledged that Cleveland was charged "higher premiums from 1997 and 2009 as a result of the BWC's group-rating program." *Id.* at ¶ 104. He further conceded that his perfunctory analysis failed to include a number of important considerations, yet insisted "that his opinions would not change even if the BWC 'may not have followed statutory requirements in this case related to Cleveland.' " *Id.* Notably, the Bureau has made no meaningful attempt to contest the lower courts' well-reasoned rejection of the defense expert's implausible testimony in the Merit Brief.

Perhaps more significantly, the state agency has conceded *sub silentio* that the testimony of its own Actuarial Officials and the results of the independent studies fully support the equitable recovery that was issued below. The supposed "battle of the parties' experts" was really an overwhelming one-sided conflict, where Josephson stood alone in

his partial support of the group-rating program, while every other actuarial specialist—both inside and outside the Bureau—as well as independent accounting firms were all in agreement that the arbitrary off-balance factor produced premiums that were no longer reflective of each employer's risk. *Cleveland*, 2018-Ohio-846, 109 N.E.3d 84, ¶ 17-23, 40-45. Following the bench trial, Judge Carolyn B. Friedland was entirely justified in finding that the virtual consensus of authority presented the most credible view of the program's disparate and intolerable financial impact.

For the first time in these protracted proceedings, Defendant Bureau has acknowledged the internal criticism that the group rating program received from its own officials with peculiar remarks such as "the need for self-criticism and improvement is why many areas of the law recognize and protect speech and action that might otherwise suggest wrongdoing." *Defendant's Merit Brief, p. 41*. While the OML certainly is in agreement that governmental agencies (like everyone else) should be encouraged to scrutinize their policies and practices, such laudable efforts mean nothing when the "self-criticism" is ignored because fundamentally flawed programs are politically popular. There can be no legitimate doubt that the 2010 group-rating reforms that restored the actuarially sound system were adopted only after the *San Allen* legal challenge began to develop momentum. The task of ensuring that the unquestionable "self-criticism" is fully implemented is now almost complete, as the Eighth District Court of Appeals has justifiably recognized that non-group employers are entitled to the same premium refunds as their private employer counterparts. *Cleveland*, 2018-Ohio-846, 109 N.E.3d 84, ¶ 63-131. This Court should refuse the invitation to undermine the endeavor.

II. THE BALANCING OF THE EQUITIES

In the view of the OML, the ultimate issue presented in this appeal is one of both fundamental fairness and governmental integrity. For reasons that have never been

disclosed, Defendant Bureau has refused to provide this state's governmental employers with the same premium refunds that were furnished to private employers once the equitable imbalances in its group-rating program were judicially recognized. A settlement agreement that was limited to private employers was entered and approved on March 20, 2013, in the class action lawsuit styled *San Allen, Inc. v. Bur. of Workers' Comp.,* Cuyahoga C.P. No. CV-07-644950 (McMonagle, Richard, J.). As the Bureau has acknowledged, those private employers that had not participated in the group-rating program (*i.e.* "non-group employers") then received refunds of overcharged premiums totaling approximately $420,000,000.00. *Defendant's Merit Brief, pp. 8-9.* This was not some sort of indiscriminate meeting-halfway compromise as the settlement provided a dollar-for-dollar reimbursement to all participating class members founded upon the agreed methodology for properly calculating the overpayment.

The Bureau's long overdue concession to refund the excessive premium payments to private employers followed in the wake of the Eighth District Court of Appeals' comprehensive decision, which confirmed that the state agency had systematically overcharging premiums as part of the actuarially-unsound group-rating program. *San Allen, Inc. v. Buehrer*, 2014-Ohio-2071, 11 N.E.3d 739 (8th Dist.). The unanimous opinion drew no distinctions between governmental and private employers, and concluded instead that:

> In this case, the BWC violated one of the most basic principles of workers' compensation insurance, i.e., that every employer participating in Ohio's workers' compensation system be charged a reasonable, accurate, and equitable premium rate that corresponds to the risk the employer presents to the workers' compensation system. The record reflects that for more than fifteen years, the BWC ignored the criticisms and recommendations of its actuarial consultants and maintained an unlawful and inequitable rating system under which it knowingly overcharged nongroup-rated employers workers' compensation insurance premiums in order to subsidize massive, undeserved premium discounts for group-rated

> employers. There were both clear winners and clear losers under the BWC's rating system. The clear winners were group-rated employers and their group sponsors; the clear losers—the nongroup-rated employers. (Emphasis added.)

Id. at ¶ 173. Notwithstanding the deliberately broad "every employer" language, governmental employers were carved out of the settlement agreement that was reached to refund the overcharged premiums.

Those governmental employers that naively assumed that the Bureau would proceed to voluntarily issue the same refunds to them notwithstanding their exclusion from the *San Allen* class were soon disappointed. As the underlying proceedings attest, the Bureau has waged an unrelenting—and undoubtedly expensive—legal campaign to ensure that these remaining "clear losers" continue to bear the financial consequences of the ill-conceived group rating program. *Id.* 2014-Ohio-2071, at ¶ 173.

Given that Defendant Bureau had agreed to accept the core holdings of the *San Allen* appellate decisions, it is still odd that the state agency's Merit Brief to this Court opens with the empathic pronouncement: "The judgment in this case was flawed in almost every way: The City of Cleveland filed its Complaint in the wrong court (not the Court of Claims), at the wrong time (not within the two-year time limit), and with the wrong common-law claim (not the statutory remedy)." *Defendant's Merit Brief, p. 1.* If any of that is indeed true, then the Bureau threw-away $420 Million Dollars by reimbursing the private employers for their overcharges. In "almost every way," the *San Allen* class action is indistinguishable from the instant proceedings. The only difference is that the case at bar was commenced by a PEC that was excluded from the class settlement. It remains a mystery why the Bureau believes the instant action presents issues of public and great general importance that merit this Court's time and attention, when that was not the agency's view just a few years ago at the conclusion of the *San Allen* proceedings.

Previously, Defendant Bureau's primary position had been that the competing equitable considerations must be weighed and evaluated in order to determine the remedy (if any) that is owed to a non-group public employer. *A.d. 10, Court of Appeals Brief of Appellant filed June 26, 2017, p. 23.* The OML certainly agrees with the maxim: "Equity for purposes of justice looks upon that as done which ought to have been done." *Ratajczak v. Carney*, 102 Ohio App. 183, 189, 74 Ohio Law Abs. 515, 135 N.E.2d 64 (8th Dist.1956). As a general rule, the trial court's balancing of the equities is afforded substantial discretion. *Joseph J. Freed & Assocs., Inc. v. Cassinelli Apparel Corp.*, 23 Ohio St.3d 94, 96-97, 491 N.E.2d 1109 (1986); *Great N. Shopping Ctr. v. Kitchen Maid of Akron, Inc.*, 8th Dist. Cuyahoga No. 45131, 1983 WL 4614, *5 (Aug. 18, 1983).

In this instance, no sensible person could possibly fault Judge Friedland for concluding from the undisputed facts that the equities weighed heavily in favor of Plaintiff-Appellee, City of Cleveland. Local governments are legally and morally obligated to guard public resources and scrutinize expenditures precisely so that they can afford to furnish vital programs and services to the citizens. Plaintiff Cleveland's refund of $4,524,392.00 in overpaid premiums will supply a well-deserved benefit to the residents in a variety of forms, perhaps most significantly through improvements to police and fire protection as well as potentially life-saving child-welfare assistance. And the long overdue recovery will further ensure that the public employer has been charged the same workers' compensation premiums as those comparable to private employers that participated in the *San Allen* settlement. It is a familiar "maxim that 'equality is equity.' " *Mikels v. Cowie Cut Stone Co.*, 34 Ohio App. 442, 446, 171 N.E. 251 (8th Dist.1929).

Judge Friedland was under no obligation to find that these compelling equities are subservient to some other legitimate objective. In stark contrast to cash-strapped local governments, Ohio's workers' compensation fund presently holds more than $9 billion in

assets, thanks primarily to unexpectedly strong investment returns.[1] The surplus has been so substantial that for the third time in four years the Bureau will be returning more than $1 billion to Ohio employers as premium rebates.[2] Denying restitution to Plaintiff Cleveland and all other non-group PECs will thus accomplish nothing legitimately worthwhile, except for perhaps providing a small contribution toward a fourth round of widely-publicized Bureau rebates. "Despite some high-profile misadventures investing in rare coins and other unusual assets, the bureau's balance sheet is sufficiently strong" to allow the state agency to comply with its legal, ethical, and equitable obligations. *See Cristino v. Ohio Bur. of Workers' Comp.,* 118 Ohio St.3d 151, 2008-Ohio-2013, 886 N.E.2d 857, ¶ 18 (Pfeifer, J., concurring).

III. COMMON PLEAS COURT JURISDICTION

Turning to the merits of Defendant Bureau's appeal, the state agency's primary argument is that the common pleas court lacked subject matter jurisdiction to grant equitable restitution to Plaintiff Cleveland. *Defendant's Merit Brief, pp. 13-24.* The OML submits that political subdivisions, just like any other non-governmental litigant, should be entitled to seek equitable, declaratory, and injunctive relief in appropriate instances against state agencies and officials as specifically authorized by the General Assembly in R.C. 2743.03(A)(2). The equitable remedy that is available in Ohio when specific funds are wrongfully collected and withheld was recognized in *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441. A class of injured workers was

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[1] Borchardt, *Ohio Businesses Could Get $1 Billion Rebate from Workers' Compensation Surplus*, Cleveland.com (March 13, 2017), available on the internet at: http://www.cleveland.com/metro/index.ssf/2017/03/ohio_businesses_could_get_1_bi.html (accessed Jan. 27, 2019).

[2] Ohio Bureau of Workers' Compensation, *The Third Billion Back; Ohio Workers Comp Rebates*, available on the internet at: https://www.bwc.ohio.gov/downloads/blankpdf/billionback3rd.pdf (Accessed Jan. 27, 2019).

seeking in that instance to force the Bureau to refund subrogation payments that had been collected under authority of a statute that was later determined to be unconstitutional. *Id.,* 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, at ¶ 2-4. The Eighth District Court of Appeals had reversed the common pleas court on the grounds that only the Court of Claims possessed jurisdiction over the action to secure monetary relief. *Id.* at ¶ 6. This Court disagreed following a careful review of the authorities addressing the proper scope of equitable relief, including *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), and *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988). *Santos,* 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, at ¶ 10-16. Justice (later Chief Justice) O'Connor explained for the unanimous Court that:

> This court held * * * that the workers' compensation subrogation statute was unconstitutional. Accordingly, any collection or retention of moneys collected under the statute by the BWC was wrongful. The action seeking restitution by Santos and his fellow class members is not a civil suit for money damages but rather an action to correct the unjust enrichment of the BWC. A suit that seeks the return of specific funds wrongfully collected or held by the state is brought in equity. Thus, a court of common pleas may properly exercise jurisdiction over the matter as provided in R.C. 2743.03(A)(2). (Emphasis added.)

Id. at ¶ 17. Accordingly, there is no need to engage in any inquiry over whether an action seeking to recover wrongfully collected or withheld funds from a state agency "resembles" a pre-1975 proceeding, because that question has been answered in the affirmative over-and-over-again. No one, including a governmental agency, is legally entitled to keep that which does not belong to them.

While the Bureau's dissertation on pre-1975 case law is somewhat interesting from an academic standpoint, the present reality is that equitable principles have been repeatedly recognized as the appropriate mechanism for forcing recalcitrant state officials

to pay funds that are legally due. *Ohio Edison Co. v. Ohio Dept. of Transp.*, 86 Ohio App.3d 189, 193-194, 620 N.E.2d 217 (10th Dist.1993) (action against the Department of Transportation for payment of relocation costs required by statute); *Ohio Academy of Nursing Homes, Inc. v. Barry*, 10th Dist. Franklin No. 92AP-1266, 1993 WL 186656, *5–6 (May 25, 1993), *aff'd*, 71 Ohio St.3d 5, 640 N.E.2d 1139 (1994) (recognizing that lawsuit against the Ohio Department of Human Services to require the payment of sums withheld from Medicaid reimbursement qualified as equitable relief); *Henley Health Care v. Ohio Bur. of Workers' Comp.*, 10th Dist. Franklin No. 94APE08-1216, 1995 WL 92101, *2-4 (Feb. 23, 1995) (finding claim was equitable, not contractual, which sought payment of the cost for supplies owed by the Ohio Bureau of Workers' Compensation); *Keller v. Dailey*, 124 Ohio App.3d 298, 303-306, 706 N.E.2d 28 (10th Dist.1997) (holding that employee of the Ohio Department of Agriculture could pursue equitable claim for unpaid overtime compensation in the common pleas court, although any request for damages could be heard only in the court of claims); *Oakar v. Ohio Dept. of Mental Retardation*, 88 Ohio App.3d 332, 336-338, 623 N.E.2d 1296 (8th Dist.1993) (recognizing that common pleas court possessed jurisdiction over action to require the Ohio Department of Mental Retardation and Developmental Disabilities to refund an estate's erroneous claim payment); *State ex rel. Midview Local School Dist. Bd. of Edn. v. Ohio School Facility Comm.*, 2015-Ohio-435, 28 N.E.3d 633, ¶ 14-16 (9th Dist.) (school district permitted to proceed with a claim against the School Facilities and Construction Commissions in the common pleas court to recover funding required by statute); *Dunlop v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 16AP-550, 2017-Ohio-5531, ¶ 14 ("It is well-established that a plaintiff may assert a claim for equitable restitution arising out of a state agency's wrongful collection or retention of the plaintiff's money.") Each of these authorities recognizes tacitly, if not openly, that an action to recover specific funds that a

state agency is wrongfully withholding is based upon equitable remedies that were available prior to 1975 and thus falls within the state's waiver of immunity.

It is difficult to fathom why yet another opinion on the issue of subject matter jurisdiction is needed, as this Court recently returned to the question of how R.C. 2743.03(A)(2) should be applied in *Cirino v. Ohio Bur. of Workers' Comp.*, 153 Ohio St.3d 333, 2018-Ohio-2665, 106 N.E.3d 41. The lead opinion was authored by Chief Justice O'Connor and was joined by Justices Fischer and DeGenaro. *Id.*, 153 Ohio St.3d 333, 2018-Ohio-2665, 106 N.E.3d 41, at ¶ 1-31. This opinion focused upon whether the monetary relief sought in the class action complaint was properly classified as equitable or legal, and reasoned:

> The crux of the claim is therefore that the bureau has improperly allowed benefit recipients to be harmed by fees charged by Chase and that the proper relief is to have the bureau pay money to compensate for that loss. The claim therefore seeks compensatory relief—a classic form of legal relief. (Emphasis added.)

Id. at ¶ 27. The analysis then concluded:

> Without any argument or evidence that the bureau has the power to order Chase to return the fees to the benefit recipients, Cirino cannot be said to be seeking specific funds based on an agency relationship between the bureau and Chase. Instead, what Cirino is seeking is to have the bureau pay him money to compensate for the loss he suffered when those fees were charged, and that is relief in the form of traditional legal damages, which is within the exclusive, original jurisdiction of the Court of Claims. (Emphasis added.)

Id. at ¶ 30.

Justice DeWine's concurring opinion, which was joined by Justices Kennedy and French, agreed that the plaintiff in *Cirino* was seeking legal relief that could be pursued only in the Court of Claims, but utilized the "locus of the specific funds" approach to reach

the same result. *Cirino,* 153 Ohio St.3d 333, 2018-Ohio-2665, 106 N.E.3d 41, at ¶ 32-40. This opinion concluded:

> Here, the BWC disbursed the funds held for Cirino to the bank. After the specific funds to which Cirino claims he was entitled were transferred to Chase, the bank deducted the fees that are at issue in this lawsuit. Thus, <u>any remedy due Cirino would be paid not from particular funds held by the BWC to which Cirino can trace entitlement, but from the BWC's funds generally</u>. As in *Montanile* [*v. Bd. of Trustees of Natl. Elevator Industry Health Benefit Plan*, ___ U.S. ___, 136 S.Ct. 651, 193 L.Ed.2d 556 (2016)] the restitution sought is legal relief, not equitable relief. Accordingly, exclusive jurisdiction resides with the Court of Claims. (Emphasis added.)

Id. at ¶ 40.

Significantly for purposes of the instant appeal, Chief Justice O'Connor's lead opinion took care to explain that the *Cirino* action belonged in the Court of Claims <u>only</u> because the funds in dispute had been transferred to, and were being held by, a third-party financial institution. *Cirino*, 153 Ohio St.3d 333, 2018-Ohio-2665, 106 N.E.3d 41, at ¶ 27-30. This same limitation was also expressed in Justice DeWine's concurring opinion. *Id*. at ¶ 38-40. No such third party exists in the instant action, and thus the Eighth District Court of Appeals' jurisdictional analysis remains sound. Regardless of which of the two *Cirino* concurring opinions is followed, the result is the same. The claims for refunds are purely equitable according to Chief Justice O'Connor's view, as there is no allegation of any harm caused by third-party. *Id*. at ¶ 27-30. And if one subscribes to Justice DeWine's approach, the "locus of the specific funds" that the non-group public employer is seeking to recover remains with—and only with—the Ohio Bureau of Workers' Compensation. *Id.,* ¶ 32-40.

Indeed, there is <u>no</u> dispute that the non-group PEC's easily-calculable and identifiable premium overpayments are sitting in the workers' compensation fund where they have always been since the moment they were wrongfully collected. That was

precisely the same situation in *Santos*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, which did not impose any further burdens of identification or tracing. The Bureau had no trouble determining the amounts of the overpayment refunds that were due to thousands of private employers at the conclusion of the *San Allen* litigation, and there was no meaningful dispute between the instant parties during the bench trial over how the correct calculations must be performed once the discriminatory factors were eliminated. *Santos* required nothing more.

Significantly for purposes of the appeal *sub judice*, the *Cirino* court reaffirmed the validity of *Santos*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, which "held that a suit seeking the return of specific funds wrongfully collected or held by the state is an equitable claim." *Cirino*, 153 Ohio St.3d 333, 2018-Ohio-2665, 106 N.E.3d 41, at ¶ 14. In explaining the difference between an action seeking funds held by a third-party (i.e., *Cirino*) and those held by the Bureau (i.e., *Santos*), the Court stated:

> In *Santos*, the bureau collected money directly from the plaintiffs and the claim sought the return of those specific funds. The money clearly had unjustly enriched the bureau, and we viewed the suit, which sought a payment by the bureau, as "an action to correct [that] unjust enrichment." That is different from the situation here. The only specific funds identified by Cirino are the fees collected by Chase, not any money withheld by the bureau. A payment *by the bureau* in an amount equal to those fees is therefore best described as compensation for a loss caused by Chase, not a correction of the bureau's unjust enrichment. (Emphasis added.)

Id. at ¶ 28.

As the Eighth District Court of Appeals justifiably concluded in both *San Allen* and the instant appeal, a purely equitable remedy is available to recover the excessive premiums that were collected through the discredited group rating program that can indeed be awarded by a common pleas court. *San Allen,* 2014-Ohio-2071, 11 N.E.3d 739, at ¶ 54-61. Because those funds are still being unjustifiably withheld by the Bureau and

not some third-party, *Cirino* has no conceivable application in this instance. The *Cirino* decision is thus completely consistent with the Eighth District's sound ruling below.

IV. EXHAUSTION OF ADMINISTRATION REMEDIES

The OML takes further issue with Defendant Bureau's continued insistence that none of the wrongfully withheld premium overcharges need to be refunded because the governmental employers were supposedly obligated to initiate and exhaust internal administrative remedies. *Defendant's Merit Brief, pp. 25-31.* This is an affirmative defense that must be established by the party asserting it. *AMM Peric Property Invest., Inc. v. Cleveland*, 8th Dist. Cuyahoga No. 99848, 2014-Ohio-821, ¶ 12; *Cleveland Constr., Inc. v. Kent State Univ.*, 10th Dist. Franklin No. 09AP-822, 2010-Ohio-2906, ¶ 48. The Bureau therefore was required to show more than just the "availability of an administrative appeal[,]" as a demonstration was necessary that the same relief could have been awarded outside the judicial system. *AMM Peric Property Invest., Inc.*, 2014-Ohio-821, at ¶ 12.

Accordingly, exhaustion is not required unless "a remedy exists which is effectual to afford the relief sought." *Kaufman v. Newburgh Hts.*, 26 Ohio St.2d 217, 219, 271 N.E.2d 280 (1971); *see also State ex rel. Cotterman v. St. Marys Foundry*, 46 Ohio St.3d 42, 44, 544 N.E.2d 887 (1989); *Karches v. Cincinnati*, 38 Ohio St.3d 12, 17, 526 N.E.2d 1350 (1988). Put differently, "where the [plaintiff] has no clear remedy and efforts would be futile he has exhausted his remedies and may obtain judicial review." *Miller v. Univ. of Cincinnati*, 1st Dist. Hamilton No. C-75410, 1976 WL 189826, *2 (Apr. 26, 1976), citing *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), and *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969).

Despite Defendant Bureau's empty assertions to the contrary, there was no administrative review mechanism available that would have allowed a mere hearing

officer to defy an agency-wide policy that had been established at the highest levels. The supposed "statutory remedy" they are touting only allowed the adjudicating committee "to hear any matter specified in division (B)(1) to (7) of this section[.]" *R.C. 4123.291(A)*. Not one of those subsections even arguably permitted challenges to official policies and regulations. *R.C. 4123.291(B)(1)-(7)*. Defendant Bureau seems to believe that it was significant that an employer could lodge a "protest relating to an audit finding or a determination of a manual classification, experience rating, or transfer or combination of risk experience[,]" but such an appeal would hardly present a suitable vehicle for overturning the group rating program. *Defendant's Merit Brief, p. 25,* quoting *R.C. 4123.291(B)(5)*. And the narrow catch-all clause appearing in subsection (6) is limited to a "decision" issued to the employer "relating to any other risk premium" which does not exist in this case. *R.C. 4123.291(B)(6)*. The group rating program was an official policy that applied to <u>all</u> employers participating in the workers' compensation system.

The reality that the adjudicating committee's authority is limited to employer-specific "decisions" is confirmed by the mandate that:

> An employer desiring to file a request, protest, or petition regarding any matter specified in divisions (B)(1) to (7) of this section shall file the request, protest, or petition to the adjudicating committee on or before twenty-four months <u>after the administrator sends notice of the determination</u> about which the employer is filing the request, protest, or petition. (Emphasis added.)

R.C. 4123.291(A). The group rating program was adopted under authority of R.C. 4123.29 effective July 1, 1991. There is no evidence in the record (undoubtedly because none exists) that the administrator sent "notice of the determination" to any non-group PECs that would have started the "twenty-four months" time bar running. *R.C. 4123.291(A)*. Nor is there any proof that any—let alone all—of the governmental employers would have been assessed excessive premiums during those first two years, which is unlikely given

the unavoidable delay in implementation. If this Court is going to indulge in the folly that the policy establishing the group rating program qualified as a "decision" within the meaning of R.C. 4123.291(B)(6), then the administrative appeal was barred long before it could have been invoked under subsection (A).

The Eighth District Court of Appeals justifiably recognized in the *San Allen* appeal that pursuing the Bureau's own administrative review mechanism would have been futile since the hearing officers had no authority to adjust the group rating program or find any inequitable miscalculations. *San Allen*, 2014-Ohio-2071, 11 N.E.3d 739, at ¶ 64-71. Given the ferocity with which the Bureau's legal team has continued to oppose the non-group governmental employer's claims for refunds, it is an unlikely notion that some hearing officer could have single-handedly invalidated the group rating program. This reality was confirmed through the uncontradicted testimony of a high-ranking Bureau official, as the Eighth District recognized:

> Tracy Valentino, the BWC's chief fiscal and planning officer, testified that in deciding matters brought before it, the adjudicating committee follows the administrative rules that have been adopted by the BWC and determines whether the BWC followed those rules, not whether those rules are lawful. She further testified that the adjudicating committee had no authority to invalidate an administrative regulation adopted by the BWC or to determine that an administrative regulation violated the Ohio Constitution or the Ohio Revised Code. (Emphasis added.)

Id. at ¶ 71. The Eighth District thus concluded that exhaustion was not required because there was no reason to believe that the Bureau's Adjudicating Committee possessed the authority to override established policy, revamp the politically popular group rating program, and remedy the agency's unlawful premium assessment practices. *Id*. at ¶ 71-75. No plausible justification exists for disturbing this sensible ruling.

V. THE APPLICABLE STATUTE OF LIMITATIONS

A. The Six Year Statute of Limitations

Defendant Bureau has abandoned the illogical theory that the statutory time bar set forth in R.C. 126.301 applies in this case. *Defendant's Merit Brief, pp. 42-49.* As directed by the General Assembly, Plaintiff Cleveland's claims for equitable unjust enrichment and equitable restitution are governed by the six year statute of limitations set forth in R.C. 2305.07.

With respect to ongoing claims of unjust enrichment, the universally-accepted method for determining the accrual date was recognized in *Pomeroy v. Schwartz*, 8th Dist. Cuyahoga No. 99638, 2013-Ohio-4920. In that instance, an insurance agency was seeking reimbursement from an employer for health insurance claims that had been paid on its behalf. *Id.* at ¶ 6-16. Claims were raised in 2011 for "breach of oral contract, unjust enrichment, and conversion." *Id.* Because the final payment had been made over eight years earlier in 2003, summary judgment was granted in favor of the employer. *Id.* at ¶ 16-17, 45-48.

On appeal, the Eighth District Court of Appeals agreed that the six year statute of limitations set forth in R.C. 2305.07 applied to the claim of unjust enrichment. *Pomeroy*, 2013-Ohio-4920, at ¶ 41. The unanimous appellate court further upheld the trial judge's determination that "the unjust enrichment claim accrued on September 11, 2003, when the last payment" was made by the plaintiff. *Id.* at ¶ 42. Based upon the First District Court of Appeals' decision in *Palm Beach Co. v. Dun & Bradstreet, Inc.*, 106 Ohio App.3d 167, 665 N.E.2d 718 (1st Dist.1995), the panel unanimously recognized that the final payment "triggered the statute of limitations[.]" *Pomeroy*, 2013-Ohio-4920, at ¶ 45. The plaintiff's attempts to extend that date beyond its final payment were rejected. *Id.* at ¶ 45-47; *see also Bank of Am., N.A. v. Darkadakis*, 2016-Ohio-7694, 76 N.E.3d 577, ¶ 42-

53 (7th Dist.) (recognizing that the six year statute of limitations for claims of unjust enrichment accrues at the last point in time that the plaintiff has conferred an inequitable benefit upon the defendant).

Defendant Bureau has advanced the novel theory that its "annual ratemaking decisions, if wrongful, amounted to discrete violations that trigged independent statutes of limitations for each year." *Defendants' Brief, p. 44*. The only so-called "decision" that was ever rendered, however, was the adoption of the group rating program almost thirty years ago. The Bureau then did nothing more than continuously follow this official standard, notwithstanding the vocal "self-criticism" of its actuarial officers and independent accounting consultants. *Cleveland*, 2018-Ohio-846, 109 N.E.3d 84, at ¶ 17-23. This ongoing violation of former R.C. 4123.29 and 4123.34 did not abate until the 2010 rate reforms were adopted. *Id*. at ¶ 26-29. There were thus no "annual ratemaking" at all, just one ill-conceived policy decision in 1989. *Id*. at ¶ 12. Once this unavoidable reality is recognized, the misguided "discrete violations" theory collapses like a house of cards.

Defendant Bureau does not appear to be overtly suggesting that the statutes of limitations began to run when the group rating program took effect for public employers on January 1, 1992, and for good reason. *Defendant's Merit Brief, pp. 42-46*. As was the case with the "twenty-four months" time bar imposed by R.C. 4123.291(A), such a nonsensical construction would require civil actions to be commenced before overcharges had even been paid by countless PECs.

Defendant Bureau has relied upon *Zion Nursing Home, Inc. v. Creasy*, 6 Ohio St.3d 221, 452 N.E.2d 1272 (1983), in support of the multiple "discrete violations" theory. *Defendant's Merit Brief, pp. 43-44*. But that was a mandamus action seeking to require the Ohio Department of Public Welfare to apply new rates that had been adopted for the

calendar year 1972. *Zion Nursing Home, Inc.,* 6 Ohio St.3d at 221, 452 N.E.2d 1272. And even if the case had involved a claim of unjust enrichment extending over a period of years, the decision fully supports Judge Friedland's award in the instant action. The mandamus complaint had been based specifically upon alleged miscalculations that occurred "for the first six months of 1972." *Id.* at 224. After that, the violations were at an end. *Id.* But the complaint was not filed until July 17, 1979. *Id.* at 221. Even starting at the end of the violations, the relators still failed to comply with the six year statute of limitations. *Id.* at 225. The decision that was rendered three decades later in *Pomeroy*, 2013-Ohio-4920, is thus completely consistent with *Zion Nursing Home*, even if one assumes that the accrual analysis is the same for both mandamus actions and claims of unjust enrichment.

B. The Time Limit For Administrative Review

Citing R.C. 4123.291, Defendant Bureau has asserted in its Brief that the "administrative remedy here also required exhaustion and set a two-year limit for rejecting or recovering for an objection." *Defendant's Merit Brief, p. 2.* It does not appear, however, that the agency is suggesting that this statute has any application to the civil claims for unjust enrichment. *Id., pp. 42-49.* Even if that is the Bureau's intention, it is worth repeating that the time bar for the limited administrative review remedy commenced only "after the administrator sends notice of the determination about which the employer is filing the request, protest, or petition." *R.C. 4123.291(A).* No such "notice" was ever established during the summary judgment proceedings below. And even if that was the case, the statute would only preclude a futile objection to the group rating program that the adjudicating committee had no authority to overturn, and not a civil claim for equitable unjust enrichment.

C. The Auditing Adjustment Payroll Report Regulation

In similar fashion, Defendant Bureau has intimated that one of its own regulations, Ohio Adm.Code 4123-17-17(C)(2), prohibits Ohio courts from ordering equitable restitution for premium overcharges collected more than two years before a demand for repayment. *Defendant's Merit Brief, pp. 2, 31-37.* The notion that any state agency can impose such timing restrictions upon the judicial system is certainly troubling, and raises serious separation-of-power concerns. If accepted by this Court, the Bureau could simply adopt a regulation requiring every legal action to be filed against it in a matter of weeks, if not days. But largely because of the public policy considerations that must be evaluated and resolved, only the legislature can establish the limitations period for a cause of action. *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019, ¶ 29.

Fortunately, this Court need not determine whether Defendant Bureau is legally entitled to override legislatively adopted and judicially recognized statutes of limitations, as Ohio Adm.Code 4123-17-17 (Auditing and Adjustment of Payroll Reports) has no conceivable relevance in this case. *Defendant's Merit Brief, p. 2.* The regulation applies only to "adjustments in an employer's account which result in changes to the amount of premium due from an employer[.]" *Ohio Adm.Code 4123-17-17(C)(2).* The provision is plainly limited to the Bureau's own internal auditing and payroll adjustments, and not to refunds ordered by a court under equitable principles.

Furthermore, a flexible discovery rule was recognized for purposes of this regulation in *State ex rel. Able Temps., Inc. v. Indus. Comm.*, 66 Ohio St.3d 22, 607 N.E.2d 450 (1993), which the Bureau has previously described as "indistinguishable" from the instant action. *A.d. 10, Court of Appeals Brief of Appellant, p. 16.* In that case, a class of temporary agencies had sought mandamus relief to compel the Industrial Commission and Bureau to refund premiums as a result of the decision in *State ex rel.*

Minutemen, Inc. v. Indus. Comm., 62 Ohio St.3d 158, 580 N.E.2d 777 (1991), invalidating certain reporting classifications. *State ex rel. Able Temps., Inc.*, 66 Ohio St.3d at 22, 607 N.E.2d 450. No claims for unjust enrichment or other equitable relief had been raised, and thus *Able Temps* is easily distinguished from the instant case. In all of the mandamus actions that the Bureau is touting, the employer was attempting to compel the agency to comply with its own payroll reporting and premium calculation rules. Since they were not allowed to pick-and-choose the regulations to be followed, those employers were also bound by the agency's timing requirements. In the case *sub judice*, however, equitable remedies are being sought as a result of the Bureau's failure to comply with the statutory mandates requiring "a reasonable, accurate, and equitable premium rate that corresponds to the risk the employer presents to the workers' compensation system." *San Allen*, 2014-Ohio-2071, at ¶ 173. No one is seeking to enforce any administrative regulations in this case, and the result is thus that *Minutemen* has no application.

It is noteworthy that even under the case-specific analysis of *State ex rel. Able Temps., Inc.*, 66 Ohio St.3d at 24, 607 N.E.2d 450, Plaintiff Cleveland's lawsuit is still timely. The regulation's two-year timing requirement was found to have been triggered in that instance by nothing more than the release of a judicial opinion involving a different employer raising its own request for a payroll classification adjustment. *Id.* The *Able Temps* Court concluded that the class of temporary agencies possessed "a clear legal right to reimbursement of premiums unlawfully assessed by [the Commission and Bureau,] with the two-year restriction of Ohio Adm.Code 4121-7-17(C) controlling." *Id.* at 25.

Here, the Bureau was alerted to the premium inequities caused by the group rating program almost immediately upon its inception. The Ohio Inspector General specifically reported:

> Since 1990, BWC's actuarial consultant, Mercer Oliver Wyman ("Mercer"), has been conducting analyses that have

> reached the same conclusion: The premiums paid by employers in group-rated programs are not high enough when compared with the losses they generate, and premiums paid by non-group employers are too high when set against their losses. (Emphasis added.)

Ohio Inspector General, Report of Investigation dated August 21, 2007, p. 8. Incredibly, the same Bureau consultant continuously "reached that conclusion in 1990, 1991, 1993, 1994, 1995, 2001 and again in August 2004, [yet the Bureau] continued to offer premium discounts of up to 95 percent to group-rated employers, thereby allowing non-group-rated employers to subsidize the losses created by these discounts." *Id.* Since the Bureau thus "knew of" the excessive premiums over a quarter-century ago, current Ohio Adm.Code 4123-17-17(C) is hardly a bar to relief regardless of the theory of recovery that is being pursued. *State ex rel. Able Temps., Inc.*, 66 Ohio St.3d at 24, 607 N.E.2d 450. No error has thus been committed with respect to the Eighth District Court of Appeals' sound statute of limitations analysis.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Ohio Municipal League urges this Court to afford a full equitable remedy to all of Ohio's non-group employers, and not just those that are privately owned, by affirming the lower courts' unanimous final judgment in favor of Plaintiff-Appellee, City of Cleveland, in all respects.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Brief** has been served by e-mail on this 30th day of January 2019 upon.

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